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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 827

UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Cross-Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Cross-Petitioners, Building and Construction Trades Department, AFL-CIO, its affiliated Local Unions, and Teamsters Union Local No. 631, petition for a writ of certiorari to review an order of Judge O. D. Hamlin of the United States Court of Appeals for the Ninth Circuit, granting a stay, pending Petition for Certiorari filed in this court in No. 725, of the mandate of the Court of Appeals of its decision affirming a decision of the United States District

Court for the District of Nevada that it was without jurisdiction to enjoin peaceful picketing by Cross Petitioners. The judgment of the Court of Appeals was entered on November 5, 1963, and, pursuant to Rule 26 of the Rules of the Court of Appeals, a mandate would have issued on the 30th day following such judgment. An order by Judge Hamlin was issued on December 3, 1963, which stayed the mandate and continued an injunction against the Cross-Petitioners as set forth in Appendix A. The issuance of this stay in the face of a clear ruling by the Court of Appeals that the District Court had no jurisdiction to issue the injunction sought, has had the effect of continuing an injunctive restraint, against the lawful activities of Cross-Petitioners by a Court which has itself ruled that it has no jurisdiction to issue injunctive restraints on the facts and law of this case. If the Court should grant the Petition for a Writ of Certiorari in No. 725 at this Term, it is respectfully submitted that the instant Petition for a Writ of Certiorari should be granted to review the above-described order of December 3, 1963.

Opinions Below

The order of Judge Hamlin appears at pages 397-400 in the record in No. 725 and is reprinted in Appendix A hereto (pages 1a-3a). The opinion of the Court of Appeals affirming the decision of the United States District Court for the District of Nevada is reported at 234 F. 2d 217, and at 54 LRRM 2487, and is reprinted at pages 2A-15A of Appendix A of the Petition in No. 725. The opinion of the District Court (Petition for Writ, Appendix A, pages 16a-22a) is still unreported.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit (Petition for Writ, Appendix A, page 1a) was entered on November 5, 1963. The order of Judge Hamlin was issued on December 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Where a United Court of Appeals has affirmed the order of a District Court denying, because of the withdrawal of jurisdiction by Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104), a preliminary injunction enjoining lawful peaceful picketing in the course of a labor dispute, does the Court of Appeals have jurisdiction under that same Act to issue a decree staying its mandate and continuing an injunction against such lawful peaceful picketing pending application to the Supreme Court for a writ of certiorari to review such application and, in the event the application is granted, the disposition of the case?

Statutes and Rules Involved

The pertinent portions of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, are set forth in Appendix B to the Petition in No. 725 and are not duplicated herein. Sections 1 and 4 of the Norris-LaGuardia Act, 29 U.S.C. §101 and 104; 28 U.S.C. §1651; Rule 62 (c), (g), Federal Rules of Civil Procedure; and Rule 26 of the Rules of the United States Court of Appeals for the Ninth Circuit are set forth in Appendix B hereto.

Statement of the Case

The statement of the case is set out in detail in the Brief in Opposition to the Petition for a Writ of Certiorari in No. 725 and is not duplicated herein.

Reasons For Granting the Writ

If the Court of Appeals correctly ruled that the Railway Labor Act was not applicable and that the District Court was, consequently, without jurisdiction, by reason of the inhibitions of the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.*, to enjoin peaceful picketing by Cross-Petitioners, we are left with the anomalous situation that although two Federal Courts have held themselves to be without jurisdiction to enjoin such picketing, by reason of a series of stays

and other decrees pending appeal, Cross-Petitioners have been enjoined from such picketing from July 31, 1963, to the present day—and will continue to be so enjoined pending the ultimate disposition of this cause by the Supreme Court.

In *Elgin J. & E. Ry. Co.* v. *Brotherhood of Rd. Trainmen*, 302 F. 2d 545 (7th Cir. 1962), the court held that the District Court, having ruled that it was without jurisdiction to issue an injunction because of the withdrawal of jurisdiction by the Norris-LaGuardia Act, was similarly deprived of jurisdiction to restore the injunction pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure. The court stated that:

> "In the case at bar, the issues were decided in favor of the unions. The Court held the carrier was not entitled to an injunction restraining the strike. However, by granting the injunction pending the appeal, the unions were restrained from carrying out the strike which they had called. The injunction was issued at the expense of the unions. In our view, the sweeping provisions of the Norris-LaGuardia Act deprived the District Court of jurisdiction to issue the temporary injunction pending the appeal."[1]

Addressing itself to a related question, the abuse of the time limitations upon the life of temporary restraining orders imposed by Fed. R. Civ. P. 65(b) through successive extensions of such temporary restraining orders, the Court of Appeals for the Second Circuit in *Pan American World Airways* v. *Flight Engineers Int. Assoc.*, 306 F. 2d 840 (2d Cir. 1962), said:

> "A union, for example, may have a perfect right to strike and may have chosen a particularly opportune time for doing so. By the issuance of a temporary restraining order a court, without adjudicating the basic right, prohibits the strike.

[1] This decision supersedes, but does not expressly overrule, an earlier Seventh Circuit decision in *Chicago River & Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (1956), aff'd 353 U.S. 30 (1957), in which no issue was raised in the Court of Appeals as to propriety of the injunction.

> "The longer the period of such prohibition the greater the chance that the right will be completely frustrated because the opportunity once suspended may, as a practical matter, be lost. And frequently recovery on the bond will not compensate adequately for the suspension or loss of the right involved."

On the other hand, a conflict of decisions arises through the 1962 decision of the Fifth Circuit in *Texas & N.O.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 163-4, cert. den. 371 U.S. 952 (1963), where the Court of Appeals sustained a District Court ruling that the Norris-LaGuardia Act precluded injunctive relief, but, nevertheless, stated on petition for rehearing that although the injunction pending appeal which the District Court had granted would terminate on issuance of the Court's mandate, such mandate might, nevertheless, be stayed under the terms of Fifth Circuit Rule 32, or to enable appellants to obtain a writ of certiorari from the Supreme Court.

The Supreme Court has not expressly decided whether a court which has held the Norris-LaGuardia Act applicable may, nevertheless, issue an injunction pending appeal, but has left the question open. *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330, 342 (1960).

Because of the conflict of decisions, the express reservation of a ruling by the Supreme Court in the *Railroad Telegraphers* case, and the obvious importance to the administration of Federal laws of a final determination of the issue, it is respectfully submitted that this question is now ripe for adjudication and should be determined by the Supreme Court, if the Court should grant the writ of certiorari in No. 725.

In filing this Cross-Petition, we do not abandon the contention stated in our Opposition to the Petition for Pan American in No. 725 that the non-final order in that case is not an appropriate subject for the grant of the writ because exceptional circumstances have not been presented by the Petition authorizing a variation of the usual rule that the

Petition is not granted with respect to non-final orders. It is respectfully submitted that, if any aspect of the case presents such exceptional circumstances, it is the situation presented in this Cross-Petition where a litigant has managed to maintain in full force and effect for a period of more than one-half year a temporary restraining order although all Federal courts involved in the case have ruled in unqualified language that they do not have jurisdiction to issue an injunction. Cross-Petitioners respectfully suggest that the validation of this type of procedure comes dangerously close to opening a substantial avenue for abuse of legal process.

Conclusion

For the foregoing reasons, it is respectfully submitted that, in the event the Court should grant the Petition for a Writ of Certiorari in No. 725, this Petition For a Writ of Certiorari should likewise be granted.

Respectfully submitted,
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APPENDIX A

Order of United States Circuit Judge Hamlin

(Endorsed) Filed DEC. 3, 1963
FRANK H. SCHMID, *Clerk*

In the United States Court of Appeals
For the Ninth Circuit

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780; JAMES J. BANNER, Individually and as Business Representative of said Local Union 1780; OPERATIVE PLASTERERS & CEMENT FINISHERS INTERNATIONAL ASSOCIATION, LOCAL UNION 797; GERALD L. BERRY, Individually and as Business Representative of said Local Union 797; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357; RALPH A. LEIGON, Individually and as Business Manager of said Local Union 357; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION 12; RICHARD M. WALSH, Individually and as District Representative of said Local Union 12; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL UNION 433; CHARLES W. LANSFORD, Individually and as Business Representative of said Local Union 433; INTERNATIONAL HODCARRIERS AND COMMON LABORERS, LOCAL UNION 872; JAMES G. RYAN, Individually and as Business Manager of said Local Union 872; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, LOCAL UNION 159; KEITH D. HICKMAN, Individually and as Business Representative and Financial Secretary of said Local Union 159; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 88; ERNEST G. NEUMAN, Individually and as Business Representative of said Local Union 88; CULINARY WORKERS UNION, LOCAL UNION 226; AL BRAMLET, Individually and as Business Representative of said Local Union 226; PLUMBERS AND PIPEFITTERS, LOCAL UNION 525; DAVID L. MCCINTY, Individually and as Business Manager of said Local Union 525; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION 631; WILLIAM P. CARTER Individually and as Secretary-Treasurer of said Local Union 631; BUILDING & CONSTRUCTION TRADES COUNCIL OF CLARK, LINCOLN, NYE AND ESMERALDA COUNTIES, NEVADA; JAMES ARNOLD, Individually and as Secretary of said Council,

Appellees.

No. 18,822

Stay Pending Petition For Certiorari

Upon examination and consideration of the application for stay pending petition for certiorari and supporting papers on file in this case and good cause appearing for this order under Section 1651 of the Judicial Code, 28 U.S.C. § 1651, Rule 26 of the Rules of this Court, and the general equity powers of this Court,

NOW, THEREFORE, it is hereby ordered as follows:

The mandate of this Court with respect to its judgment of November 5, 1963 denying appellant's motion for a preliminary injunction is hereby stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before the 3rd day of January, 1964.

The above-named appellees and each of them, and each of all of their officers, agents, servants, employees and attorneys, and each and all persons in active concert or participation with said appellees, who receive actual notice of this order, by personal service or otherwise, are hereby restrained and enjoined from, in any manner and by any means, calling, causing, endorsing, inducing, instigating, encouraging or conducting any strike, concerted refusal to report for work or accept duty assignments or any other concerted work stoppage or interference with work, or picketing of or among any of the employees of appellant Pan American World Airways, Inc., at any part of the Nevada Test Site of the United States Atomic Energy Commission or any of the appellant's facilities at said Nevada Test Site, or any other interference with appellant's normal operations at any part of said Nevada Test Site, and all acts in furtherance thereof.

This order is made upon the following condition: that the bond heretofore filed and approved by this Court with

respect to the injunction herein presently in effect shall remain in full force and effect.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.
Dated: December 3, 1963.

DEC. 4, 1963

O. D. HAMLIN,
U. S. Circuit Judge

A TRUE COPY,
Attest:

FRANK H. SCHMID,
Clerk

APPENDIX B

Statutes and Rules Involved

Norris-LaGuardia Act, 29 U.S.C. Sec. 101, 104, 47 Stat. 70

§ 101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. Mar. 23, 1932, c. 90, § 1, 47 Stat. 70.

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139 §90, 63 Stat. 102.

Federal Rules of Civil Procedure, Rule 62(c), (g)

Rule 62. Stay of Proceedings to Enforce a Judgment

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. As amended Dec. 29, 1948, effective Oct. 20, 1949.

Rules 26, Rules of the United States Court of Appeals for the Ninth Circuit

Rule 26. Mandate or other Process

1. Subject to paragraph 2 of this Rule, in all cases finally determined in this court other than original proceedings, a mandate or other proper process in the nature of a procedendo shall, upon the payment of any costs due in the case, be issued, as of course from this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of a circuit judge who participated in such decision, shall be issued on the expiration of 30 days from the date of such final determination, unless within said time a petition for rehearing is filed, in which case the mandate shall be stayed until 5 days after the determination of such petition.

2. In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 1 of this Rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded. As amended Jan. 2, 1960; Oct. 30, 1961, eff. Dec. 13, 1961.